

**Radio Free Europe/Radio Liberty, Incorporated and  
Edward Witanowski, Petitioner and Directors  
Guild of America, Inc. Case 2-RD-1035**

June 30, 1982

**DECISION ON REVIEW AND  
DIRECTION OF ELECTION**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On September 15, 1981, the Regional Director for Region 2 issued his Decision and Order in the above-entitled proceeding, in which he dismissed the petition on the basis that the Employer is a political subdivision within the meaning of Section 2(2) of the Act and therefore outside the coverage of the statute. On October 9, 1981, the Regional Director denied the Employer's motion for reconsideration. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's Decision and Order denying the motion for reconsideration, on the grounds that the Regional Director made factual errors and departed from precedent.

On December 30, 1981, by telegraphic order, the request for review was granted. Thereafter, the Employer filed a brief with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings:

1. The Employer, Radio Free Europe/Radio Liberty, Incorporated (RFE/RL), is a Delaware nonprofit private corporation engaged in the production and transmission of radio broadcasts to Eastern Europe and the Soviet Union. RFE/RL currently broadcasts in 21 languages. The broadcasts consist largely of news, news analysis, and programs focusing on various cultural, economic, and scientific topics. Broadcasts deal primarily with developments in the listeners' own country, its foreign policy, and events in other Eastern European countries. RFE/RL's headquarters and main installation is located in Munich, West Germany, where most of its 1,700 employees work. It maintains transmitter facilities in West Germany, Spain, and Portugal, news bureaus in major European cities, a small programming office in New York City, and another office in Washington, D.C. The decertification petition in this case, covering a unit of producer/directors and associate producer/-

directors, was filed by an employee in the New York office.

Originally, RFE/RL consisted of two separate nonprofit corporations. Radio Free Europe was incorporated in New York in 1950, and Radio Liberty was incorporated in Delaware in 1951. These corporations were organized by private individuals, but apparently were financed in substantial part by the Central Intelligence Agency (CIA), an agency of the United States Government. In 1971, CIA funding ceased. Congress then appropriated money for the two radio stations through the Department of State. Meanwhile, the Presidential Study Commission on International Broadcasting was created to make recommendations regarding a mechanism for providing funding for the radio stations. Pursuant to those recommendations, the Board for International Broadcasting Act was enacted in 1973. That act established the Board for International Broadcasting (BIB), an agency of the United States Government, as a conduit for congressional funding of Radio Free Europe and Radio Liberty. In 1976, these two corporations were merged to form RFE/RL, Inc.

In addition to funding RFE/RL<sup>1</sup> and exercising financial oversight, BIB reviews and evaluates RFE/RL's programming and assures that it is not inconsistent with United States foreign policy. There are seven members of BIB. The President of the United States appoints five members, and the chief operating executive and the chairman of the board of directors of RFE/RL are *ex officio* members. BIB has promulgated regulations to carry out its statutory mandate. These regulations deal with matters such as the duties and responsibilities of the BIB chairman, BIB's staff, preparation of broadcasting policy guidelines, program evaluation, roster of broadcast languages, appointments to certain executive positions at RFE/RL, budget development, and financial oversight over RFE/RL by BIB. The regulations state that "[t]he BIB shall not impose any prior constraint on programming, on the preparation of broadcast materials or on the manner in which those materials are broadcast by RFE/RL." 22 CFR Chapter XIII, Section 1300.5(a). With respect to RFE/RL's labor relations, the regulations provide that "RFE/RL shall be responsible for the appointment, assignment, promotion and separation of its employees and such personnel actions, with the exceptions noted below in paragraph (e) of this section, shall not require concurrence of the BIB." 22 CFR Chapter XIII, Section 1300.9(a). (Par. (e) lists certain executive positions, the appointments to which must be

<sup>1</sup> RFE/RL received approximately \$90 million for fiscal year 1980.

approved by the executive committee of RFE/RL's board of directors. The chairman of the BIB is an *ex officio* member of the executive committee for this purpose.)

The Union has represented a small unit of producer/directors and associate producer/directors in the New York programming office since at least 1973.<sup>2</sup> The latest collective-bargaining agreement expired September 30, 1980. The contract contains provisions concerning job classifications, union security, salaries, vacations, holidays, severance pay and notice, grievances, insurance, and transfers.

The Regional Director dismissed the decertification petition on the basis that RFE/RL is a "political subdivision" exempted from the Board's jurisdiction by Section 2(2) of the Act.<sup>3</sup> He relied on *N.L.R.B. v. Natural Gas Utility District of Hawkins County*,<sup>4</sup> in which the Supreme Court stated that the Board's test to determine whether an employer constitutes a political subdivision is whether it is "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." The Regional Director concluded that RFE/RL met the second criterion because it was responsible to BIB. In particular, he noted that BIB approves the top executive personnel at RFE/RL, oversees RFE/RL, and advises RFE/RL so that its programming is not inconsistent with United States foreign policy.

RFE/RL filed a motion requesting reconsideration by the Regional Director, arguing in essence that the exemption for "political subdivision" refers to a subdivision of a State, not to a subdivision of the United States Government. In denying this motion, the Regional Director stated that this contention was without merit.

The Regional Director's grounds for finding that RFE/RL is a "political subdivision" and hence exempt from our jurisdiction is clearly wrong. Section 2(2) of the Act defines "employer" as

... any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than

when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

The plain wording of the statute discloses that the political subdivision exemption applies only to political subdivisions of the States. The phrase "political subdivision thereof" is restricted to the antecedent term "State" in the clause. RFE/RL is clearly not a political subdivision of any State. The *Hawkins County* case, relied on by the Regional Director, consequently has no bearing on this case.

In resolving the jurisdictional issue here, we apply the "right of control" test enunciated in *National Transportation Service, Inc.*, 240 NLRB 565 (1979). That test inquires "whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." 240 NLRB at 565. RFE/RL is a private corporation and thus clearly meets the definition of "employer" in Section 2(2).<sup>5</sup> It is also quite clear that RFE/RL has enough control over labor relations so that it can bargain with a union. The Board for International Broadcasting Act does not mention anything about personnel policies at RFE/RL. The regulations promulgated by BIB explicitly recognize that RFE/RL is responsible for its personnel policies including the appointment, assignment, promotion, and separation of its employees.<sup>6</sup> Additionally, RFE/RL has had a collective-bargaining relationship with the Union for several years. As mentioned previously, the latest contract contained provisions that are typically contained in collective-bargaining agreements regarding job classifications, salaries, grievances, and the like. Therefore, it is obvious that RFE/RL retains sufficient control over its own labor relations so that it is able to engage in genuine collective bargaining. Finally, it is immaterial that RFE/RL is funded by the United States Government where, as here, the Government exercises no control over RFE/RL's labor relations.<sup>7</sup>

While the record does not establish any direct or indirect inflow of goods or services, it does show

<sup>2</sup> Directors are responsible for producing broadcasts, recordings, direct transmission, and remote recordings.

<sup>3</sup> Sec. 2(2) states in pertinent part that "[t]he term 'employer' . . . shall not include . . . any State or political subdivision thereof . . . ."

<sup>4</sup> 402 U.S. 600, 604-605 (1971).

<sup>5</sup> Further, it appears that the Presidential Study Commission on International Broadcasting explicitly stated in its recommendations that the stations should continue to be operated by private corporations, and that Congress concurred with this recommendation when it enacted the Board for International Broadcasting Act.

<sup>6</sup> The BIB chairman does serve on the committee which reviews the appointments to several executive positions at RFE/RL, but there is no evidence that this influences the Employer's labor relations.

<sup>7</sup> *Local 701, International Brotherhood of Electrical Workers (The University of Chicago d/b/a Argonne National Laboratory)*, 255 NLRB 1157 (1981).

that the Employer is financed by moneys appropriated by Congress through the BIB. For fiscal year 1980, RFE/RL received approximately \$90 million. In our view, this adequately demonstrates that the Employer's operations have a substantial effect on commerce, and establishes the required statutory jurisdiction of this Board.<sup>8</sup> Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

At the hearing, the Union maintained that there was a valid collective-bargaining agreement in effect at the time the decertification petition was filed. If this were so, the petition would be dismissed pursuant to the Board's contract-bar rules.<sup>9</sup> The collective-bargaining agreement between RFE/RL and the Union expired on September 30, 1980. By letter dated October 22, 1980, RFE/RL offered to extend article 7 of the contract, which deals exclusively with salaries, for an additional 3 years. This letter was prompted by the October 1, 1980, cost-of-living salary increase of 9.1 percent granted to Federal employees who are covered by the Federal Government's general schedule pay scale. (RFE/RL apparently adheres to this scale in compensating its employees, although it is not required to.) By letter dated July 31, 1981, 9 months later, the Union accepted RFE/RL's offer. The decertification petition was filed on August 3, 1981.

We find that there is no contract which can serve to bar the petition. The latest collective-bargaining agreement expired on September 30, 1980. The Union's July 31, 1981, letter, in which it accepted RFE/RL's offer of a salary increase, does not constitute a contract that will bar a petition. It has long been settled that "to serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; it will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial."<sup>10</sup>

4. The unit is described in the collective-bargaining agreement as follows:

## 2. DEFINITION OF COVERAGE:

A "Director" means anyone employed on the staff of RFE/RL who produces and directs, as

hereinafter defined. This agreement covers all directors employed by RFE/RL in a "Producer/Director capacity," as defined below. It covers, additionally, all directors employed by RFE/RL in an "Associate Producer/Director capacity," as defined below.

(a) "Producer/Director capacity" is defined to mean a director who directs broadcasts, recording, direct transmissions, remote recordings (except where only one mike with portable [sic] recorder is used for recording messages or interviews or actualities), regardless of complexity.

(b) "Associate Producer/Director capacity" is defined to mean a Director who under general supervision, produces and directs the less complex RFE/RL programs (no more than two voices, no music or bridges other than the intro and closing themes, and utilizing no more than two microphones), and voices programs as applicable.

There is no dispute that this is an appropriate unit for purpose of collective bargaining.

The Union contended at the hearing that two employees in the unit, the Petitioner, Edward Witanowski, and Edward Kosowitz, will soon be retiring. The Union suggested that, as a potential retiree, Witanowski was not an "able Petitioner." Even aside from the fact that Witanowski stated at the hearing that he had no definite plans to retire, he nevertheless has the same right as any other employee to file a decertification petition. We also find that both Witanowski and Kosowitz are eligible to vote in a decertification election, despite any retirement plans they may have,<sup>11</sup> unless they leave their employment prior to the election.

Finally, the Union asserted at the hearing that Kosowitz is a supervisor and as such is not a member of the bargaining unit. Shortly before the hearing, the Employer had requested a postponement of the hearing because its counsel was out of the country. The Regional Director erroneously denied this request. Consequently, the Employer was without legal representation at the hearing, and the record was not fully and fairly developed with respect to Kosowitz' status.

Accordingly, we shall direct that Kosowitz' ballot be voted under challenge.

[Direction of Election and *Excelsior* footnote omitted from publication.]

<sup>8</sup> *East Oakland Community Health Alliance, Inc.*, 218 NLRB 1270 (1975).

<sup>9</sup> *General Cable Corporation*, 139 NLRB 1123 (1962).

<sup>10</sup> *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163-64 (1958).

<sup>11</sup> *Personal Products Corporation*, 114 NLRB 959, 961 (1955); *Whiting Corporation, Spencer and Morris Division*, 99 NLRB 117, 122-123 (1952).